CENTER FOR INSTITUTIONAL REFORM AND THE INFORMAL SECTOR

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TOWARDS AN INDEPENDENT AND ACCOUNTABLE JUDICIARY: REPORT ON JUDICIAL REFORM IN MADAGASCAR

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None of those persons should of course be held responsible for opinions expressed in this report, or for inaccuracies that might be found therein.

TOWARDS AN INDEPENDENT AND ACCOUNTABLE JUDICIARY.
REPORT ON JUDICIAL REFORM IN MADAGASCAR

INTRODUCTION

This report is a follow-up to an earlier report written for IRIS by Dr. Hilton Root. of the Hoover Institute, entitled *Environment for Investment in Madagascar: Institutional Reform for a Market Economy*, which was released in February 1993. Its purpose is to recommend reforms that would increase the independence of the judicial power. The earlier inquiry found widespread dissatisfaction among economic operators as to the legal and regulatory environment of business prevailing in Madagascar. It was felt notably that the commercial law was in a chaotic state. and that the existing judiciary could not be relied on to enforce commercial contracts.

Among other moves, an independent judiciary was thought to be part of the solution. The safety of business and commercial transactions would no doubt be increased if the judiciary were acknowledged to be competent, impartial and invulnerable to corruption.

My duty as a consultant was to develop the ideas prcscntcd in that report to promote recommendations on:

a) The legal basis of judicial independence;

b) The budgetary resources needed to establish and maintain independence of the judiciary;

c) The rules and practices required for the creation of an independent judiciary and the rule of law; and

d) The training in commercial law of judges and lawyers.

I visited Madagascar from 23 August to 7 September 1993. My activities were twofold. First, I undertook an in-depth study of basic legal documents like the Constitution of 1992. the *Statut* de la *magistrature* of 1979 and of amendments thereto, and the various statutes dealing with the organization of courts. Second, I supplemented this by interviews with officials from the Ministry of Justice of Madagascar, high-ranking magistrates from the three levels of courts. and lawyers from private practice.

In order to cover point (d) of my mandate, I passed through Rome, on my way to Madagascar, to visit at the International Development Law Institute (IDLI), where I met with Mr. Michael Hager (Director), and Mr. Alexandre Cordahi. I was given an opportunity to appraise on the spot the facilities and programs offered by the Institute.

My stay occurred in a transitional period. A new Constitution was ratified by referendum and came into force on 18 September 1992. The second ballot of presidential elections, won by Professor Albert Zafy, was held in February 1993, followed by legislative elections. A new Prime Minister. Mr. Francisque Ravony. was elected by the National Assembly on August 9, and won a vote of confidence on his program on August 23. He appointed his cabinet a few days later. but the portfolio of Justice had yet to be filled when I left the country. However. the prevailing expectation was that the holder of this office would, like rhe Ministers of Defence and of Police, enjoy the status of a Minister delegate to the Prime Minister. This would mean that the Ministry of Justice is likely to be subject to closer supervision by the Prime Minister.

The transitional character of the conjuncture was increased by constitutional provisions. Under the new basic law, the structures of the judiciary are in some aspects to be altered drastically. However, those changes will become actual only upon passage by Parliament of the specific laws contemplated notably by ss. 103, I 16 | 19 and 124 of the Constitution. Those laws have not been adopted yet, though a draft Supreme Court Law was reportedly circulating within the judiciary.

A. OBJECTIVES OF THIS REPORT

Why insist on judicial independence? *Without independence, the judiciary* is likely to lose the public credibility that is essential to its authority. When economic operators hold. and magistrates themselves acknowledge, that "now nobody trusts the judicial system". there is a very serious problem indeed. The following quote from a ruling of the Supreme Court of Canada would likely be approved by judges in many other countries:

> "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case hut also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is. therefore, important that a tribunal should be perceived as independent. as well as impartial, and that the test far independence should include that perception"[1]

This report is premised on the idea that judicial independence is an instrumental value for reaching a higher **goal,** whis is **an impartial and credible judiciary**[2]. For the safety of business

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[1] *Valente v. R.*, (1985) 2 S.C.R. 673. on p. 689 (Supreme Court of Canada).

[2] This perspective owes much to Professor Mauro Cappelletti, " 'Who Watches the Watchmen?'. A Comparative Study on Judicial Responsibility" in Simon Shetreet and Jules Deschênes ted.), *Judicial Independence: The Contemporary Debate* (Dordrecht, Martinus Nijhoff Publishers, 1985):

transactions. but also for the benefit of all the Malagasy people. justice has to be carried fairly. without political and administrative pressure or corruption. This necessitates that judges be protected against political interference with regard to their appointment. career, pay and status. At the same time. in order to avoid abuses. judges must be held accountable through some procedure. Executive interference does not produce an impartial and credible judiciary. Magistrates also point out that judicial corporatism. or the tendency for the judiciary to insulate itself from any external control, also remains a pitfall insofar as it may lead to abuses by judges themselves. Some balance has to be found between those two competing values. This is why this report will both propose measures designed to increase the independence of the judiciary, and recommend some checks and balances on the judicial power. Indeed. the need for judicial accountability is acknowledged by the new Constitution, which provides *inter alia* for the creation of a new body known as the General Inspection of Justice.

What are the criteria for an independent judiciary? There is a risk for outside observers to evaluate other countries using their own as a benchmark. The chief reference instrument for the preparation of this report was the book edited in 1985 by Professor Simon Shetreet and Justice Jules Deschênes: *Judicial Independence: The Contemporary Debate* [3]. This relatively recent book includes contributions on judicial independence in 27 countries" presented at a world conference held in

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p. 550-589, esp. p. 556. See also the contribution by Shetreet in the same book. p. 657. In the same vein. Chief' Justice Antonio Lamer, of the Supreme Court of Canada, wrote: "The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a 'means' to this 'end'. If judges could be perceived as 'impartial' without judicial 'independence'. the requirement of *independence' would be unnecessary". *R.* v. *Lippé*.(1991) 2 R.C.S. 114. on p. 139.

[3] See note I

[4] Those countries were: Australia, Austria. Bangladesh, Belgium. Brazil. Canada. Finland, France. Ghana. Germany, Greece. Great Britain. India. Israel. Italy, Japan. Malta, The Netherlands. Nigeria. Norway. Portugal. South Africa, Spain. Sweden. Uganda, the United States of America and

Montreal in 1983, followed by cross-national studies[5]. Therein can be found the text on standards of -judicial independence such as the International Bar Association *Code of Minimum Standards of Judicial Independence*, adopted at the IBA Biennial conference held in 1982 in New Delhi (India)[6], and the *Universal Declaration on the Independence of Justice*,[7] adopted by the first World Conference on the Independence of' Justice held in Montreal (Canada) in 1983. These documents will be referred to as the "IBA Standards" and the "Universal Declaration" respectively. Those documents are the closest that can be found to a definition of judicial independence that imposes basic standards while respecting legitimate differences between countries and legal systems.

Uruguay.

[5] The most useful of such cross-national comparisons is Simon Shetreet's contribution, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges". p. 590-68 I.

[6] The IBA Standards are reprinted on p. 388-392 of the book.

[7] The Declaration is reprinted on p. 447-461, while the French version thereof can be found on p. 462-477. Earlier contributions of that nature are also reprinted in the book. They are the *Syracuse Draft Principles on the Independence of the Judiciary*, of 1981 (printed on p. 4 14-42 1) and the *Tokyo Principles on the Independence of' the Judiciary in the LAWASIA Region, of* 1982 (text on p. 441-446). The Universal Declaration is a more substantial document, as it includes standards on international judges (part 1), on lawyers (part 3), on jurors (part 4), and on assessors (part 5). Only part 2, dealing with national judges. was used in this report.

B. GENERAL FEATURES OF THE MALAGASY JUDICIARY

In view of the sharp contrast between the basic principles underlying the judiciary in Anglo-American countries and in Madagascar. it is necessary to summarize briefly at the outset the basics of the Malagasy judicial system for the benefit of North American readers.

In Madagascar. the people fulfilling judicial duties are part of a wider unified body known as the magistrate (*la magistrature*). Following the French model. this body includes both "silting" and "standing" magistrates[8]. The latter correspond to US public prosecutors and Canadian Crown prosecutors. insofar as their duty is to prosecute on behalf of the government. The former correspond to "judges" in Anglo-American parlance. Like civil servants. magistrates are recruited at a young age through examinations. Thereafter. they will perform duties as judges or as public prosecutors throughout their career, switching constantly from one side to the other. This report will focus on sitting magistrates, but some of its recommendations will affect standing magistrates as well.

There are three major categories of courts. They include, from bottom up, 12 lower courts (*Tribunaux de première instance*), two courts of Appeal and the Supreme Court".

A second Court of Appeal was created earlier this year. with a seat in Fianarantsoa and jurisdiction over the two Southern provinces. The older Court of Appeal, which dates back to the

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[8] Judges sit on the bench. hence the expression "sitting magistrates". while prosecutors normally stand up to argue their case.

[9] The basic statute dealing with the organization of the Judiciary in Madagascar is the *Ordonnance no. 60-107 de 1960 portant réforme* de 1 *'ordre judiciaire*. This document provides for the *Tribunaux de première instance* and the two Courts of Appeal. The Supreme Court was created by Law 61-013 of 19 July 1961.

1890s, mamtams Its seat in the capital and keeps jurisdiction over the four Northern provinces. Each Court of Appeal includes six divisions known as *Chambres*. These *Chambres*, which are committees of judges selected by the chief justice, focus on select portions of the caseload: Civil, *Immatriculation* (for the registration of land deeds), Commercial, Social, *Correctionnelle*, and Accusation.

The Supreme Court was set up in 1961. It is divided into four *Chambres: The Cassation civile* and *Cassation criminelle* hear appeals dealing with civil and criminal cases respectively. The *Chambre administrative* hears cases (in first and final instance) opposing the State to persons. Under the new Constitution, it will henceforth be known as the *Conseil d'Etat* and be made a part of the Constitutional Administrative and Financial Court (CAFC)[10]. The fourth division of the Supreme Court, the *Chambre des comptes,* will henceforth be known as the Cour des Comptes, [11] and will also be made a part of the CAFC. The latter, a creation of the new Constitution, will replace the former High Constitutional Court, and include a Constitutional Court in addition to the *Conseil d'Etat* and the *Cour des Comptes*..

Following thc examplc of Francc, Madagascar has adopted the dual jurisdiction model, meaning that cases opposing the State and a person will be judged by a distinct tribunal, the *Conseil d'Etat*, while another set of courts will judge litigation between two persons.

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[10] Constitution of 1992, ss. 105 and 114.

[11] The role of the *Cour des Comptes,* as specified in s. 115 of the new Constitution, is to control the execution of appropriation statutes and the management of public corporations.

The judicial system on the island also included until recently *ad* hoc tribunals. They were respectively known as Special Economic Tribunals (set up in 1976)[12] and Special Criminal Tribunals (created in 1977)". Those creatures of the former Socialist regime were empowered to deal with crimes of an economic nature and to proceed more expeditiously than ordinary courts. Those two categories of ad hoc courts were reportedly disbanded over the past months. This is a welcome move, as ad hoc tribunals are generally not conducive to an independent judiciary[14].

C. EXISTING ENCROACHMENTS ON JUDICIAL INDEPENDENCE

Encroachments on judicial independence in Madagascar come essentially from two sources. Either collectively or individually, judges are largely dependent on the executive *power* for their appointment, promotion, pay and status. The executive may decide not to implement judicial decisions. In addition, individual judges are dependent on *chief justices.'"*

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[12] Special economic tribunals were created by Ordonnance no. 76-019 of 24 May 1976 **(J.O.R.M.,** 12 June 1976, p. 1382). Their operation is analyzed in the contribution of a group of magistrates of the *Chambre des Comptes*: "Le Tribunal Special Economique (TSE)" in Académie Malgache - EESDEGS, *Actes du Collogue scientifique international sur le droit des affaires - droit de développement, tenu à Antananarivo, 11-14 décembre* 1990 (Antananarivo, 1991), 15 p.

[13] *Ordonnance no 77-068 du 30 septembre 1977 portant création des Tribunaux criminels spéciaux.*

[14] See Shetreet, *op. cit.*, p. 615-616. See also IBA Standard no. 21, and s. 2.06 of the Universal Declaration, which specifically prohibit ad hoc tribunals.

[15] Professor Shetreet calls "Internal Judicial Independence" the principle that judges should be free from pressure from their superiors and colleagues. *Op. cit.* p. 637.

The purpose of this report is not to uncover individual abuses or to examine the history of the judicial machinery over past decades. Its goal is rather to examine the extent to which existing rules and practices enable the executive or the chief justices to influence judges. Nothing in this report should be interpreted as blaming the conduct of previous Ministers of Justice, ot chief justices, or ot individual magistrates. The overriding concern was with finding rules that would protect the independence of the Malagasy judiciary, not to condemn the behaviour of individuals who worked the system in the past.

The chief legislative source on the judiciary in Madagascar is the *Stutut de la Magistrature* [16]. This document was enacted in 1979, and is the third of its kind since independence[17]. It stipulates in detail how magistrates, both sitting and standing, are to be recruited, paid, promoted, and disciplined whenever necessary. **The existing** *Statut* **is a** product of the Ratsiraka period. Because the new Constitution makes numerous different provisions, a new *Statut* will be needed'*.

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[16] *Ordonnance no 79-025 du 17 octobre 1979 yortant Statut de la Magistrature* (J.O.R.M., 17 Oct. 1979, p. 2333), later ratified by Law 79-027 of 13 February 1980 (J.O.R.M. 1980, p. 238). As the title implies, the *Statut* was enacted by the Executive by way of an Ordinance rather than by an Act of Parliament. as the latter delegated to the Executive the power to do so under s. 81 of the Constitution of 1975. I was told that the *Statut* had been amended only twice since its enactment, in 199 1 and 1992. Those amendments will be specifically referred to below.

[17] *Statuts de la Magistrature* were enacted in 1960 and 1973 respectively. It is significant to remark that **each new** *Statut* followed major political upheavals.

[18] Under **an** interim provision of the Constitution of 1992, the existing legislation remains in force insofar as the provisions thereof are not contrary to the Constitution (s. 147).

1. Appointment of Judges

Judges are currently appointed by the executive'". The general rule is that they owe their appointment to a decree proposed by the Minister of Justice. l'here are two exceptions for higher offices. The Chief Justice *(Premier Président)* of the Supreme Court is appointed by the President of the Republic in Supreme Council of the Revolution (a political body, now abolished, that was appointed by the President himself under the 1975 Constitution)'". Other chief justices are appointed by the same from a list of at least three names put forward by the Minister of Justice. Therefore. under the political context prevailing until 1991, the President of the Republic, either personally or through his appointees, had control over all judicial appointments.

Given their inconsistency with some of the new constitutional provisions. those rules will have to be rewritten following notably the abolition of the Supreme Council of the Revolution in 1991. and the reduction of presidential powers the following year under the new Constitution.

Executive discretion is limited by the requirement that magistrates be law graduates. graduates of the Institute of Judicial Studies" and pass successfully a competitive examination. Section 22 of the *Statut* opens another door for access to the profession? known as direct integration. This allows civil servants or lawyers with 10 years of practice to be appointed magistrates without

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[19] The rules pertaining to the appointment of judges are mostly found in s. 22 to 25 of the *Statut.*

[20] Under s. I 18 of the new Constitution however. **the** *Premier Président of* the Supreme Court is to be elected for a three-year term by the *Conseil Supérieur de la Magistrature* and the general assembly of the magistrates of the Supreme Court.

[21] The *Institut d'Etudes Judiciaires* (IEJ) is a school for magistrates. on the model of the French *Ecole Nationale de la Magistrature.*

being obliged to pass the same examination, subject to restrictions as to their number [never more than a quarter of the total number of appointments) and the courts to which they can be appointed (positions on only two courts, both of an administrative nature, may be filled this way)[22].

2. Promotion

Like civil servants, magistrates need to be promoted over the years on the basis of their merit, as evaluated by their supervisors, the *chefs* de *cour* (chief justices). There are five grades, subdivided into steps. Jumping from one step to the next is automatic after two years. However, grade progression, which may be granted after 5 years of service in the same grade, depends upon the evaluation by superiors. Chief justices have the power to rate lower-ranking magistrates. Further, the Minister of Justice is involved in the evaluation of magistrates in two ways: rating the chief justices is his sole prerogative, and he is empowered to revise the ratings of other magistrates by chief justices[23].

Promotion from one grade to the next is a complex annual operation. For one to be entered into the list of magistrates who will be promoted (known as the *tableau d'avancement*), one

[22] Those courts were the *Chambre administrative* and the *Chambre des Comptes* of the Supreme Court. The nature of their duties made it easier for a civil servant than for a lawyer from private practice to be directly appointed thereon.

[23] *Statut*, ss. 40 and 41.

must be first proposed by a chief justice on the basis of favourable ratings. Recommendations for the promotion of chief justices themselves originate with the Minister*'.

Decisions on promotions for most magistrates are made by a body known as the *Conseil Supérieur de la Magistrature* (CSM). The CSM is a joint committee of magistrates and members of the Executive. Following an amendment in July 1992, the CSM now includes 7 members from the Executive and about 26 magistrates (my own figures)"". Representatives from the Executive include the Prime Minister (who chairs the CSM), the Minister of Justice (as deputy chairman) and officials from his department[26]. Magistrates include the 6 highest-ranking magistrates from the Supreme Court and the two Court of Appeals*', on an *ex officio* basis, and 20 magistrates elected

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[24] *Statut, s. 43.*

[25] *no 92-023 du 8 juillet 1992 fixant la nouvelle composition du Conseil Supérieur de la Magistrature* (J.O.R.M. 1992, p. 1508). This amendment was a result of the changes in the machinery of government wrought by the Convention of 31 October 1991, whereby many presidential prerogatives were transferred to the Prime Minister. The most important alteration, compared with the earlier composition, was that the Prime Minister was substituted to the President of the Republic as President of the CSM.

[26] Other representatives from the Justice Department are the Secretary of State for Justice (a junior Minister), the *Directeur de Cabinet* (chief of staff), the *Secrétaire Général* (highest ranking civil servant), the Director of Judicial administration and an *Inspecteur en service à la Chancellerie*

[27] In the case of each of those three courts, the two magistrates who sit on the CSM are the *Premier Président* and the *Procureur général*, *i.e.* the highest sitting and standing magistrates on the court.

by their colleagues for a two-year term from among the various courts[28]. The CSM makes decisions through a vote, whenever necessary, with the Executive power in a minority.

However. the Minister's position is reinforced by two factors. First, chief justices are promoted by him only: the CSM's role in this area is advisory only." Second, inquiry revealed that when the CSM meets to consider promotions, the Minister is the only member who has full knowledge of the merits of the individual candidates, as copies of the files of the candidates for promotion are not to be distributed to other participants. Their contents will simply be read aloud at the meeting.

As the judicial career in Madagascar starts with a probation period of one year. and nothing prohibits the assignment on the bench of a young magistrate under probation, young magistrates are sometimes fulfilling judicial duties while remaining uncertain about their career prospects"'. Section 2.20 of the Universal Statement holds that the appointment of judges for probationary periods is inconsistent with judicial independence, while adding that this does not exclude probationary periods for judges after their initial appointment in countries which have a career judiciary. Despite this proviso. it is difficult to disagree with Justice Jules Deschênes that "a judge

[28] There are three magistrates from the Supreme Court. two magistrates from each Court of Appeal. one magistrate from each *Tribunal* de *Première Instance*. and one magistrate from the central administration.

[29] t. *s. 47.*

[30] The lowest position on the pay scale of magistrates is "Magistrat stagiaire". In all fairness. the fact that the CSM rather than the Minister is etnpowered to recommend a magistrate for definitive appointment following probation reduces the risk of executive interference.

on probation is not independent and there is a risk that his decision may be coloured by his plans for the future"[31].

3. Pay and other advantages

Under s. 19 of the *Statut*, the pay and other advantages of magistrates are decided by decree of the Council of Ministers. Nothing prohibits a lowering of salaries of magistrates, nor a restructuring of the pay scale. The rules thereon are to be found in a decree[32] passed in 1979.

Salaries depend on the grade and step of each individual magistrate. To each step corresponds an index. Indexes vary from 1000 for a magistrate under probation to 2450 for a magistrate of the first (highest) grade. One's yearly salary is obtained by multiplying 2000 FMg[33] by the particular index corresponding to his or her position on the scale. Yearly salaries therefore vary between 2 million to 4.9 million FMg or, in US dollars, from $11 11 to $2722. I found little data to put those figures into perspective, but I was told that the salary of a Member of the *Haute Autorité de l'Etat*, the legislative body throughout the interim period in 1991-92, was 20% higher than the salary of the highest-ranking magistrates. Magistrates interviewed were unanimous in finding their

[31] Quoted by S. Shetreet, *op. cit.* , p. 625.

[32] *Décret no 79-284 du 16 octobre 1979 fixant 1 'échelonnement indicinire du corps des magistrats* (J.O.R.M. 1979, p. 2358).

[33] This figure was provided to me by the *Directeur de Cabinet* of the Minister of Justice, as it is not mentioned in the Decree.

salaries inadequate, and pointed out that the high proportion of women within their own ranks (about 50%) should be seen as a result of their low pay rather than of any affirmative action program"[34].

Further research revealed the existence of an important tool that the executive power might use to influence the judiciary. The Minister of Finance is expected to provide each magistrate with a residence paid for by the State (*logement de fonction*). In practice, only a minority of magistrates actually enjoy this advantage. The problem is that the cost of lodgings in the capital (where not less than one-third of magistrates live) is extremely high: renting suitable lodgings may cost between 200.000 FMg and 300.000 FMg a month, while monthly salaries for magistrates vary between 166.667 FMg and 408.333 FMg. Being supplied with a residence means an enormous non-taxable increase on one's income[35]. As no criteria seem to regulate the apportionment by the Executive of those luxury perks, the potential for undue influence is enormous.

[34] In early September 1993, there were 33 magistrates in the first (highest) grade, 49 in the second, 80 in the third, 93 in the fourth and 41 in the fifth (lowest). I am indebted to the *Directeur de Cabinet* of the Minister of Justice for those figures.

[35] The gap between the fortunate few who are provided with a residence and those who are not is barely reduced by a cut of 15,000 FMg a month in the salaries of the former, and by the payment to the latter of a compensatory indemnity of 15,000 FMg a month (plus 7000 FMg per child at home). It was not possible to ascertain whetheher the latter indemnity was taxable or not.

TABLE 1

SALARY SCALE FOR MALAGASY MAGISTRATES

Grade	Scale	Index	Number of magistrates
1	Single	2450	33
2	2	2350	49
	1	2250	
3	3	2100	
	2	1950	80
	1	1800	
4	3	1675	
	2	1550	93
	1	1425	
5	3	1300	
	2	1200	41
	1	1100	
	Probation	1000	

N.B. The number of magistrates within each grade does not include magistrates seconded to other duties.

For each scale, the salary to be paid is computed by multiplying the applicable index by 2000 FMg.

The pay conditions of Malagasy magistrates are incompatible with the standards cited above. Both the IBA Standards and the Universal Declaration[36] require that judicial salaries be determined by law, be regularly readjusted to account for price increases independently of executive control, and that they cannot be decreased except as a coherent part of an overall public economic measure.

[36] IBA Standards no. 14 and 15. Sections 2.19 a) and 2.21 of the Universal Declaration.

4. Assignment

Numerous positions are included under the label "magistrate". As noted earlier, there is a horizontal distinction between sitting and standing magistrates. Some 218 magistrates belong to the former, 74 to the latter[37]. To this is added a vertical distinction, as the *Statut* specifies various positions within each grade: *Premier Président de Cour, Procureur général, Président de Chambre, juge d 'instruction,* etc. Assigning a magistrate to a particular position is the sole prerogative of the Minister of Justice[38].

Section *7* of the *Statut* dispels *prima facie* some frightening prospects by stating that sitting magistrates (i.e. judges) are *inarnovibles.* The meaning of this word must be correctly understood, It does not mean "life appointment" for judges, as some people understood: magistrates must retire at 60 under the existing *Statut.* Rather, it means that judges cannot be assigned to another position without their consent. Historically, *inamovibilité* emerged in France as a counterweight to executive influence over the appointment nnd promotion of judges. The French rule is even more stringent, as it prohibits the Minister to shuffle a magistrate upward?'.

However, *inamovibilité* for sitting magistrates in Madagascar was reduced to almost nothing by a proviso in section 7 that magistrates may be assigned by the Minister of Justice to

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[37] Figures provided by the Department of Justice in early September, 1993.

[38] Section *79* of the *Stntut* provides that the management ("la gestion") of the magistrates belongs to the Minister.

[39] This protection is granted by s. 64 of the Constitution of the French Republic, and by s. 4 of the French *Statut de la Magistrature.*

another position without their consent, following only an *advice* from the **CSM.** This means that a judge can be re-assigned almost as easily as a prefect, as the CSM's role is purely advisory. Section 100 of the new Constitution is an improvement insofar as it requires, for such a re-assignment, a service requirement (*nécessité de service*) whose existence would be acknowledged by the CSM.

Another provision of the *Statut* seems to limit potential abuse by listing specific positions for each grade. For example, the first grade includes the positions of *Premier Président* and *Procureur général* at the Supreme Court, while the fifth (lowest) grade include those of *juges d 'instruction, Auditeurs de deuxième classe à la Chambre administrative et à la Chambre des comptes de la Cour Suprême*. At first sight, this looks like a specific *cursus honorurn.* In practice, however, the relevance of this complex table with its list of positions corresponding to each grade is severely undermined by the practice known as **Delegation.** Over the years, Ministers of Justice have made a habit of assigning magistrates to positions that did not correspond to those of their grade: they could not under the *Statut* be "appointed" to those positions, which should have been filled by magistrates of a higher grade, but they could be "delegated" to them. Thereafter, they can be moved freely from the position they hold, because they were "delegated" to it, rather than "appointed". Therefore it becomes possible for the Minister of Justice to fill the highest judicial positions with people of a lower grade, or even (to take an extreme hypothesis) to systematically assign to the highest offices mediocre people who could not have expected to make it on the basis on their own qualifications.

The need for flexibility was the initial rationale for that practice. If and when no candidate was available for a particular position, a magistrate of an inferior grade could be delegated to it as an interim measure: this magistrate kept the salary corresponding to his or her own grade, while fulfilling the duties of a position of a higher grade. However, the Ministry of Justice found this procedure so useful over the years that "delegating" magistrates almost became the rule rather than

the exception. According to a chief justice, some 250 out of 300 magistrates are presently delegated to positions other than those they had been appointed to.

In addition, a magistrate may be moved from the sitting to the standing magistracy or vice-versa, meaning that he can zig-zag from the bench to the public prosecution and back to the bench, as decided by the Minister of Justice. The close connection between the two categories of magistrates is pushed at the extreme in lower courts, where the *procureur général*, in charge of prosecution, cumulates this position with that of *Président de section du Tribunal*, *i.e.* that of presiding judge!

Both the IBA Standards and the Universal Declaration require that the power to assign judges be vested in a judicial authority and that a judge should not be re-assigned without his consent, such consent not to be unreasonably withheld[40]. The explanatory notes appended to section 2.18 of the Universal Declaration summarize the criticisms that may be addressed to the existing regime: "Transfer can be used to punish an independent and courageous judge, and to deter others from following his cxamplc".

5. Discipline

Discipline is breached when a magistrate fails to the duties of his position, to honour, to delicacy and to dignity. The wording of that definition, found in s. *54* of the *Stutut*, is patterned on the corresponding provision (s. 43) of the French *Statut*.

[40] IBA Standard no. 10. Sections 2.16 and 2.18 of the Universal Declaration.

The rationale for discipline is to ensure that magistrates do comply with the ethical rules regulating their offices. In Madagascar, the existing regulations protect the judiciary against executive interference with regards to the disposal of complaints against magistrates. Indeed, a clear distinction is established on that account between sitting and standing magistrates. Discipline of the latter is the prerogative of the Minister of Justice, but discipline of the former is dealt with by a *conseil de discipline* composed of all the judges of the Supreme Court or of the Court of Appeal. This body sits *in camera*, must hear the accused and provide reasons for judgment[41].

However, the initiative for disciplinary proceedings lies exclusively with the Minister of Justice. While it is perfectly legitimate for the Minister to have this power, his monopoly in this area raises concerns: magistrates who engage in unethical behaviour but who happen to be good friends of the party or people in office might expect a bit more indulgence than others. If magistrates conclude that one of their colleagues is liable to disciplinary proceedings, they have no power to start the process. Instead they must convince the Minister to use his powers to that effect.

6. Political activities of magistrates

Judicial independence requires that judges not be obliged to behave according to the canons of the philosophy of a particular political party. It requires also that judges refrain from political activities, as the public trust and respect for the judiciary would be shattered if judges behaved as politicians, even outside the bench. Section 2.28 of the Universal Declaration prohibits

[41] *Statut*, ss. 55 to 66.

judges from being active members of, or to hold positions in, political parties. Madagascar must be complimented for having moved in the right direction on that account over the last years.

The politicization of justice was one of the worst innovations of the 1979 *Statut* de *la Magistrature*. Three provisions thereof symbolized the will of the new rulers to that effect. First, ss. 2 and 3 required magistrates to exercise their duties in full respect for the spirit and for the fundamental goals of the Socialist Malagasy Revolution. Magistrates had "to imbue themselves" with that spirit, and any demonstration of hostility to the setting up of the socialist order was prohibited. Second, the oath of office for magistrates included a reference to the Socialist Malagasy Revolution. Third, the formerly existing prohibition of political activities for magistrates was repealed. According to the explanatory notes of the *Statut*, magistrates enjoyed full citizenship rights and should feel free to participate to the political management of the country. To make things clear, parts of the Socialist Revolution's Red Book dealing with justice were reprinted in the official compendium of penal legislation. All this squared well with the idea, candidly expressed in the explanatory notes of the *Statut*, that Justice had to be an instrument for defending the revolution.

This is now history. An Ordinance of 1991 repealed the infamous ss. 2 and 3 and deleted any reference to the Socialist Revolution from the oath of magistrate?. Activity within a political party and the exercise of an elective public mandate are now prohibited by the 1992 Constitution". Section 18 of the 1993 Ordinance pertaining to legislative elections now prohibits

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[42] Ordonnance no 91-008 of 7 August 1991 (J.O.R.M. 1991, p. 1934).

[43] Constitution, s. 102

magistrates from being Members of Parliament"". To politically-minded magistrates, the only door left open would be to stand at elections as independent candidates, subject to the necessity of resigning their position as magistrates upon being elected, a quite implausible scenario.

7. Execution of judgments

The end result of the judicial process is not the making of a ruling, but the execution thereof. The sources consulted argue that for the judiciary to be independent, there must be a certainty that its decisions will be implemented by the excutive[45]. On that account, the Malagasy situation is unsatisfactory, insofar as the executive has the privilege of not enforcing judicial decisions at their own discretion.

This awkward situation does not stem from statutory law, but from the jurisprudence. In the *Couitéas* decision, rendered in 1923, the French *Conseil d'Etat* vindicated the French government for not having executed, "for the purpose of maintaining public order and security", a judicial decision made 15 years earlier. The highest French administrative court ruled that it was the duty of the government to appreciate the conditions for a judicial decision to be executed, and to

[44] *Ordonnance no 93-007 du 24 mars 1993 relative à l'élection des députés à l'Assemblée Nationale* (J.O.R.M. 1993, p. 675).

[45] See Shetreet, *op. cit.*, p. 620.

refuse to order the intervention of the army when they felt that doing so would endanger order and security[46].

This decision was made in relation to the requested expulsion of native tribes from a vast domain of 38.000 ha in Tunisia (then a protectorate of France) a lower court had acknowledged to belong to Mr. Couitéas. The French occupying force apprehended serious troubles if the decision was implemented. It must be added that the owner received financial compensation from the State as a result of that decision.

In Madagascar, this French case has apparently been relied on to an extraordinary extent. According to the magistrates interviewed, it is frequently invoked by the executive to be dispensed from executing important rulings by the courts. The *litchis* case in Tamatave in December 1992 was quoted. I was shown a letter signed by Prime Minister Rasanamazy a few days earlier dispensing the administration from implementing a judicial decision, without any explanation being offered as to how this move would protect public order and security[47]. According to one of the magistrates interviewed, a mere phone call would have been sufficient to produce the same result

It goes without saying that this doctrine throws the whole judicial system into uncertainty and paves the way for executive abuse. Those who intend to launch judicial proceedings and who are aware that people in high office are hostile towards them, will likely hesitate to seek

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[46] The *Couitéas* decision is discussed in M. Long *et al., Les grands arrêts de la jurisprudence administrative,* Paris, Sirey, 8e edition, 1984, p. 182 sq.

[47] The letter, dated 26 August 1993, bore the reference number 792-93 PM/SGG/CM, and pertained to a judicial ruling made in 1976. Reference to this particular document should not be construed as a criticism, but as a mere illustration.

justice through the courts, for their possible victory can be made hollow by executive *fiat*. **This is** why section 7 of the IBA Standards and section 2.47 of the Universal Declaration provide that the State shall have a duty to provide for the execution of judgments of the courts, and that the judiciary shall exercise supervision over the execution process.

8. Court Management

Though the *Statut* is mute on this point, it appears that over the last years the day-to-day management of courts has been left to chief justices. The Ministry of Justice decides how much money will be allotted to each court, and chief justices decide individually how their own allotment will be spent. For example, this year, the Supreme Court got 69.9 million FMG, the two Courts of Appeal 235.2 million FMg (including 160 million for the new Court of Appeal established earlier this year in Fianarantsoa, with jurisdiction over the two Southern provinces), while the 12 lowest courts (*Tribunaux de première instance)* shared 267.6 million FMg between themselves. The various divisions of the Ministry of Justice were allotted 977.9 million FMg. To this must be added more than 2 billion FMg for the administration of penitentiaries. The total budget for Justice was therefore 3.6 billion FMg, including 572.7 million FMg for the administration of courts.

While none complained about interference from the Department in the day-to-day management of courts, magistrates interviewed were unanimous in pointing out the shabbiness of their material conditions. Up to six magistrates may have to share the same office. Copies of basic legal documents are often not available: According to one of the chief justices interviewed, only 5 of the 35 magistrates under her supervision had a copy of as basic a document as the Code of Civil Procedure. The library of the Justice building in Antananarivo is used as a meeting room rather than

as a legal library. The building Itself, the *Palais de Justice* (where the various courts sit and the offices of magistrates are located) is crowded. I could see for myself that walls had to be erected within the entrance hall so as to create a supplementary room for the sittings of a court. Within that room, the only ventilation was provided by an open door, there were some 50 people in the room, most of them standing.

9. Independence of judges from chief justices

So far, the attention has been focused on how the executive power was threatening judicial independence. Judicial independence further requires that in the decision-making process, the individual judge be free from his superiors and colleagues[48].

Construing legislation is, indeed, more than a mechanical operation. It is a complex process at the end of which highly qualified people may honestly disagree, especially if the court happens to include judges whose judicial philosophies differ widely. For the process to be fair, each judge must be free to reach and express his own conclusions.

This leads to questioning the career system itself, insofar as it necessitates annual ratings of judges by chief justices. The fact that the ultimate power for rating magistrates lies with the Minister of Justice is itself cause for concern. But even rating by chief justices is worth pondermg, and not only because of the potential of executive meddling created by the fact that rhey are themselves rated and promoted by the Minister of Justice.

[48] IBA Standard no. 47.

The form used for rating judges lists four criteria for evaluating the merit of a magistrate:

- General worth (*valeur générale)*
- Professional ability (*capacité professionnelle*)
- Efficiency (*efficacité*)
- Manner of serving (*manière* de *servir*)

A comparison with the form used for rating civil servants reveals that those criteria are exactly those used for rating higher civil servants (of categories "A" and "B").

This raises two concerns. First, there is no document outlining the meaning of those criteria, which therefore can be understood in different ways by chief justices. Second, the fourth criterion, *manière de servir*, seems to measure the hierarchical subordination of the magistrate. This is a criterion quite relevant when the person rated is a civil servant, even of a higher rank, or is a standing magistrate. However, there is no place for it in evaluating a sitting magistrate, who is expected to express his true opinions without checking first if they correspond to those of **the chief** justice. The Universal Declaration concurs with this view. Section 2.17 lists the following criteria to be considered for the promotion of judges: integrity, independence of mind, professional competence, experience, humanity, commitment to uphold the rule of law. References to "manner of serving" are conspicuously absent from that list.

D. REFORMS THAT SHOULD BE ENVISAGED

Most of the encroachments on the ideal of an independent judiciary analyzed above stem from the conception of the magistracy as a career. In Madagascar, judges are part of a category

of public servants - the magistrates- which in many ways is likened to the civil service. It is quite revealing that *s. 79* of the *Statut de la Magistrature* states that for all cases not provided by the *Statut,* the applicable provisions will be those of the *Statut général des fonctionnaires*, a legislation which deals with the appointment, promotion and career of civil servants throughout the government[49].

It is worth recalling that the judiciary is a power distinct from the executive and legislative powers of the State, not a mere legal weapon of the executive placed on the same footing as the armed forces and the civil service. Its duties are specific and important. Judges must interpret the law, apply the law to particular cases, and also control the activity of the other branches of government. For those reasons, they need to be independent.

The career system prevailing in Madagascar is a legacy of French colonialism, and, according to Professor Grivart de Kerstrat, of the University of Aix/Marseilles, this system is not on the whole very favourable to an independent judiciary". Hierarchy means subordination, inequality of rank, promotions decided from the outside. As Professor Simon Shetreet wrote, "hierarchical structures within the judiciary give rise to latent pressures on the judges and may result in subservience to judicial superiors"[50].

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[49] For example, the rules on judicial pensions are those applicable to civil service pensions. A good case can be made that a separate regime of judicial pensions should be established.

[50] See F. Grivart de Kerstrat, "France", in Shetreet and Deschênes, *op. cit.,* p. 67. For similar evaluations from French magistrates or observers, see Georges Boyer Chamard, *Les Magistrats*, Paris, Presses Universitaires de France, 1985, p. 54 sq., and Me Daniel Soulez Larivière, *Les Juges dans la balance,* Paris, Editions Ramsay, 1987, (new edition, 1990), p. 72, 87, 120, 124 and 223.

[51] Shetreet, *up. cit.,* p. 641.

For those reasons, many other countries, not simply Anglo-American ones, have chosen to maintain judges in their positions for long periods of time, to provide them with high and stable salaries, to put all judges within the same court more or less on the same footing (chief justices having minimal authority over their "brothers", as they revealingly call them), to separate clearly judges from public prosecutors and to provide only the former with exceptional immunities. Many countries feel also no need to create a distinct set of courts for settling disputes arising between the State and persons.

It does not now appear possible, however, to alter the basics of the Malagasy judicial system, for at least two reasons. First, features like duality of jurisdiction, the career system and the inclusion of judges and public prosecutors within a single body, seem well entrenched into the mentality of Malagasy lawyers and jurists. Second, they seem to be entrenched in the new Constitution as well, and legislative measures that would encroach on them would likely be struck down as unconstitutional. For example, dual jurisdiction appears to be entrenched by the interplay of s. 114, which **deals** with the *Conseil d'Etat*, and s. 117, which mentions "les juridictions de l'ordre judiciaire" (the set of courts which deal with disputes between two persons). In addition, ss. 99. 100 and 101 confirm the presence of judges and public prosecutors within the magistracy. "Grades" are specifically mentioned in s. 100, together with the principle that magistrates must fulfil the duties of the position they were appointed to and which correspond to their respective grades. The existence of a *Conseil Supérieur de* la *Magistrature* as well as some of its specific duties are also entrenched by s. 100, 104, 107 and 118.

The corridor for reforming the system is thus made rather narrow by the country's new basic law. Some point out that the 1992 Constitution will not last forever (indeed, it is the third basic law of the country since independence, not including the Panorama Convention of 1991), but as long

as this document exists, it must be complied with, as the rule ot law requires". One may suggest the passage of a constitutional amendment at the initiative of either the President of the Republic (acting with the concurrence of the Cabinet) or of one-third of Members of the National Assembly. However, a constitutional amendment, under s. 139, requires the consent of a majority of three-quarters of the members of both Houses of Parliament (the National Assembly and the Senate), and may further be deferred to the electorate for ratification at a referendum. While they do not preclude small-scale amendements, those stringent requirements seriously reduce the chances of success of a reform moving Madagascar away from the career system, as this would require a very wide consensus that does not appear to exist at present.

This is why the perspective adopted in this report is more modest. The purpose is to suggest ideas that would increase the independence of the judiciary, but which at the same time would be compatible with the existing Constitution, at least in the vast majority of cases.

1. Appointment of judges

The new Constitution alters the mode of appointment for some higher judicial positions. Under s. 107, the members of the Constitutional, Administrative and Financial Court will henceforth be selected by the President of the Republic with the concurrence of the Cabinet (for 3 Members), by the National Assembly (for 2), the Senate (1) and the CSM (3). Under s. 118, the Chief

[52] For an outline of Malagasy constitutional history, see Herman M. Liebowitz, Matthew F. Jodziewicz and Robert P. Payne, Jr, "Democratic Republic of Madagascar", in Albert P. Blaustein and Gilbert H. Flanz, Constitutions *of the Countries* of *the World* (Dobbs Ferry, N.Y., Oceana Publications, April 1988): p. 1-7.

Justice of the Supreme Court will be elected for a three-year term by the CSM and the magistrates of the Supreme Court sitting together.

Apart from the adaptations necessitated by the abolition of the Supreme Council of the Revolution and the redefinition of the duties of the President of the Republic, the Minister of Justice should not be deprived of the power of appointing judges. Section 2.14 of the Universal Declaration acknowledges that "participation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession". The possibility for executive abuse is already reduced by the requirement that magistrates be graduates of the Institute of Judicial Studies, and by the existence of a competitive examination. Two useful innovations may however be considered.

First, the duties of the CSM might be enlarged in the area of appointments, so that the Council must be *consulted* by the Minister before appointments. For that purpose only, the CSM could include a delegate from the Bar, who would take an oath of secrecy, so as to include a wider evaluation of potential candidates.

Second, the possibility already opened by s. 22 of the *Statut* of appointing judges from outside the magistracy could be widened. The number of such appointments would still remain not more than a quarter of the total, but such appointments could be made to all courts. not simply to two administrative courts. Lawyers with 10 years of practice should have the opportunity to be appointed judges (as is already the case), with the consent of the CSM. While it would not directly increase judicial independence, this measure would open the doors of the judiciary to other talents and perspectives. Appointments of that nature would open the bench to people having some experience of the private sector and of commercial law. The veto power enjoyed by the CSM, a body dominated by career magistrates, should prevent the Minister from abusing that power.

2. Promotion

The procedure for evaluating and promoting sitting magistrates might be improved by the following changes.

First, the rating of sitting magistrates should no longer include a criterion like *manière de servir*, but should be based exclusively on the professional, intellectual and personal qualities of magistrates. The meaning of the criteria on which ratings are to be grounded should be explained in a document prepared by the CSM, so that they be understood the same way by chief justices. Inspiration might be derived from the following list of criteria which are now used in the rating of magistrates in France (in italics, the original French words).

- Responsibility (*Sens des responsabilités*)
- Strength of character *(Force de caractère*)
- Authority (*Autorité*)
- Public relations (Relations *publiques*)
- Dedication to duty (*Dévouement* au *service*)
- Common sense 2nd judgment (Ron *sens et jugement*)
- Balance (*Pondération*)
- Ability to summarize *(Esprit de synthèse*)
- Capacity for work (*Puissance* de *travail*)
- Knowledge of the law (*Connaissances juridiques*)
- Understanding of how the law is to be implemented (*Sens de l'upplicution du droit*)
- Organizational abilities (*Sens* de *l'organisation et qualités d'administration*)
- Initiative *(Esprit d'initiative)*
- Writing abilities (*Qualités de rédaction*)
- Ability to preside over proceedings or to speak *(Aptitude à la présidence des audiences ou uptitude à la parole)*
- Professional relations (*Relations profession- nelles*)[53]

[53] The list is taken from Soulez Larivière, *op. cit.,* p. 85-86.

Second, the power of the Minister of Justice to rate magistrates in a final way, found in *s.* 41 of the *Statut*, should be repealed, and the ratings given by chief Justices should be final. If the Minister of Justice became aware of the existence of facts likely to alter the rating of a particular candidate for promotion, he should disclose that fact at the meeting of the CSM, like any other member.

Third, all members of the CSM should be allowed to examine the files of the candidates for promotion, as well as the files of magistrates who were not proposed for promotion by chief justices and who, pursuant to *s. 46* of the *Statut*, nevertheless formally requested a promotion to the Minister of Justice.

Fourth, the power of the Minister of Justice to propose the promotion of chief justices would be reduced by complying with the rule that chief justices for the Supreme Court and the Court of Appeals must be magistrates of the first grade.

Fifth, consideration should be given to the possibility of reducing the size of the CSM. The French CSM, which deals with over 5700 magistrates'", has a size of 11, while the Malagasy CSM has over 30 while it deals with about 300 magistrates. This high number of members increases the danger that the confidentiality of proceedings be breached. The CSM should continue however to include the Minister of Justice as sole representative of the executive, and a majority of magistrates, some on an *ex officio* basis, others being elected by their colleagues. As the

[54] Chammard, *op. cit.,* p. 17.

Constitutional, Administrative and Financial Court is expected to guarantee the independence of the magistrates", it would be fitting to include a member thereof in the CSM.

Sixth, prohibiting the assignment to the bench of magistrates under probation would eliminate the possibility for a judge to make judicial decisions while his or her own career prospects remain uncertain.

3. Pay and other advantages

In order to protect magistrates against both corruption and executive pressure, the following measures should be considered.

First, the *Statut* should no longer allow the executive to determine the salary of sitting magistrates by decree. Judicial salaries should be determined by law rather than by executive decree. The danger of arbitrary manipulation of judicial pay scales would be reduced by the practice for a law to be publicly debated in Parliament (unless the executive were allowed to legislate by ordinance, under s. 96 of the Constitution). Reducing judicial salaries should be avoided in practice, except as a coherent part of measures applicable to legislators. Any readjustment of parliamentary salaries resulting from inflation should be automatically applicable to magistrates.

Second, the indexes determining the salary corresponding to each scale should be readjusted upwards. The salary of magistrates of the first grade should be raised to a level comparable to the salary of a Cabinet Minister, while the salary of the lower grades should be increased

[55] Section 98 of the Constitution.

proportionately. It is to be hoped that better pay for judges will reduce the likelihood of corruption, as low pay is often cited as one of the reasons for the spread of corruption among certain magistrates.

Third, the practice of allotting to magistrates residences and cars supplied by the State should be rethought. Such non-taxable privileges are costly for the State. They increase the possibility of executive pressure whenever the pool of cars and homes is too small for those entitled. While there is a rationale for chauffeured cars for chief justices and for judges of the highest courts, I see no reason why magistrates, even of the highest rank, should be endowed with a residence paid for by the State, a privilege that even countries immensely wealthier than Madagascar do not grant, except to half a dozen executive or legislative leaders.

It might be argued that the potential threat to judicial independence created by the practice of allotting residences and cars to magistrates would be eliminated if all magistrates were actually endowed with such perks. The answer is that the resources of the Malagasy government are not unlimited, as indeed existing practices amply confirm.

4. Assignment

There is a need for greater stability in judicial offices, a reduction of executive discretion and a clearer distinction between standing and sitting magistrates.

The possibility for magistrates to move from the bench to the prosecution and back throughout their careers is not conducive to judicial independence. Without any harm to the rule of law, prosecution duties may be accomplished by younger lawyers under the close supervision of the Ministry of Justice, and do not require as much independence from the executive power. The duties of a judge require greater experience, maturity and independence. Some provisions of the Constitution

and of the *Statut* dealing with *inamovibilité* and discipline indeed acknowledge the relevance of that distinction.

Once recruited, magistrates should be assigned by the executive to various duties as standing magistrates, and the initial stages of their career (grades 5 and 4) should be accomplished on the prosecution side. Once they reach grade 3, after a minimum of 10 years of experience, they would be invited to choose between staying on the prosecution, within which they could later reach grades 2 and 1, or moving to the bench. Those who selected the bench would be expected to stay there until retirement, moving eventually upwards to other positions on the bench. Should they change their mind thereafter, they would be allowed to come back to the prosecution, but only once before retirement. This measure would contribute to increase the psychological gap between the bench and the prosecution, and to foster the independence of the former.

In addition, the practice of delegation should be explicitly prohibited by the new *Statut*, and the provisions of s. 100 of the new Constitution on *inamovibilité* should be complied with strictly. In particular, the CSM should insist on its prerogative of refusing to ratify the shuffling of a sitting magistrate without his consent if it feels that the "service requirements" claimed by the Minister are insufficient.

5. Discipline

The existing provisions of the *Statut* concerning disciplinary proceedings correspond to international standards. As mentioned, the power of the Minister of Justice to start such procedures is acceptable, but there are reasons to question his monopoly on that issue. Chief justices should also

have the opportunity to launch such procedures in case of breach of standards. They indeed would be in a better position than the Minister to become aware of such breaches.

The respective roles of the councils of discipline created by the *Statut de la* Magistrature, of the General Inspection of Justice , of the Supreme Court and of the High Court of Justice, need to be clarified. The existing *Statut* grants to councils of discipline the power to judge alleged breaches of discipline (*fautes disciplinaires*), defined as breaches by a magistrate of the duties of his position, of honour, of delicacy and of dignity. The new Constitution creates a power of "controlling the compliance with the deontological rules applicable to magistrates, and the actions of the judicial staff"[56]. However, this new power is granted by the Constitution to two different bodies: s. 117 grants it to the Supreme Court, while it is also included by s. 103 in the attributions of the General Inspection of Justice! One possible way to reconcile those apparently conflicting provisions is to view the General Inspection of Justice as a division of the Supreme Court, as suggested by s. 103 al. 2, which states that the Inspection is attached ("rattachée") to the Supreme Court. However, how cnn WC rcconcile this reading of the Constitution with the composition of the General Inspection, which is expected to include representatives from the Government, from Parliament and from the magistrates, and therefore is sharply differentiated from other subdivisions of the Supreme Court?

The picture is made more complex by s. 121 of the Constitution which provides for the deferral to the High Court of Justice of accusations of a criminal nature against members of the Constitutional, Administrative and Financial Court and of the Supreme Court (but not against other judges).

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[56] "Contrôler le respect des règles déontologiques qui sont particulières aux magistrats ainsi que des agissements du personnel de la justice".

Therefore, one can find in the *Statut* and in the Constitution, as they now stand, three possible offences (breaches of discipline, breaches of deontological rules, crimes) and four different bodies to deal with them (the councils of discipline, the General Inspection of Justice, the Supreme Court and the High Court of Justice). Clarifying those overlapping provisions should keep Malagasy lawyers busy for a while.

A common characteristic of these four bodies (with the possible exception of the General Inspection of Justice) is that they are composed exclusively of magistrates, or that magistrates are a majority of their members. Therefore, accusations against judges will be heard by other judges. Indeed, members of the Supreme Court are entitled to deal with criminal accusation against one of their own, because four of the nine members of the High Court of Justice are to be drawn from the Supreme Court under s. 123. There is a clear danger of judicial corporatism there. The traditional warning of Juvenal ("Who Watches the Watchmen?") is worth remembering. Judges are human beings, they may be inclined to be more indulgent towards one of themselves than towards an outsider. They may also be inclined to downplay the importance of some breaches for fear that the prestige of the judiciary as a whole be damaged[57].

In keeping with the emphasis put in the introduction on judicial accountability as well as independence, accusations of a criminal nature (including corruption as defined by s. 177 to 183 of the Penal Code) against sitting magistrates should be dealt with by a non-judicial body, in order to dispel any temptation, or suspicion, of complacency. In the United States, judges may be impeached by the Senate at the initintivc of the House of Representatives , while in Britain and

[57] See Cappelletti, *op. cit.*

Canada, judges may be dismissed from office upon a joint address from both Houses of Parliament". All those procedures are rarely, if ever, resorted to, but their very existence contributes to deter judicial abuses. According to Professor Mauro Cappelletti, of Stanford University, "a reasonable degree of political accountability, far from necessarily representing an actual menace to judicial independence, may have a sound admonitory impact upon the judges; and may also act as a valuable safeguard against a tendency of the judiciaries in many countries to insulate themselves too radically from the rest of the system of government, a system of which they are a part""[59].

This measure would necessitate a constitutional amendment, as some parts of the Constitution now otherwise provide. With regards to criminal accusations, the High Court of Justice, while continuing to include a majority of judges when dealing with criminal accusations against political officials, should include only parliamentarians, or a majority thereof, when dealing with criminal accusations against judges. A complementary measure would be to specify that within the General Inspection of Justice contemplated in s. 103 of the Constitution, the representatives of Purliament and of the Government will not be outnumbered by the representatives of the magistrates, or reduced to the position of observers, but that they will be members with full prerogatives.

6. Political activities of magistrates

On this issue, substantial progress has been recorded over the last years. The existing rules might be supplemented by a prohibition in the Electoral Code of candidatures by magistrates

[58] U.S. Constitution, Article 1 Section 2.5 and 3.6. *Constitution Act*, 1867 (Canada) s. 99.

[59] Cappelletti, *op. cit.*, p.571.

at all elections. Also, the prohibition of political activities for magistrates found in s. 102 of the Constitution should be reprinted in the new *Statut de la Magistrature*. Any breach of those rules should be defined as a breach of discipline.

7. Execution of judgments

On this issue, it is necessary to curb through legislation the doctrine of the *Couitéas* case, or more exactly, the amazing extension that this doctrine has been given through practice in Madagascar.

The law should state as a principle that it is the duty of the executive power to execute judicial decisions. Section 63 of the Constitution states that the Prime Minister is in charge of executing ("veille à exécuter") judicial decisions: this provision should be understood as imposing a duty rather than conferring a power.

It can be argued that rapid execution of ill-founded judicial decisions may cause irreparable harm to the losing side. A simple remedy is for the government to appeal such decisions to a higher court. This move should suspend the execution of a decision until final ruling had been made by that court.

If the government feels it must retain the power to refuse to implement judicial decisions which adversly affect public order and security, this power should be exercized subject to the following restrictions. First, such a decision should be taken by way of a decree of the council of ministers, and the reasons for such a decree to be taken should be stated. Letters or verbal instructions would be worthless to accomplish that purpose. Second, the government's decree would automatically be deferred to the Constitutional Court , so that the government be obliged to convince

the Court that the reasons invoked in the decree are valid. Should the Court come to the opposite conclusion, the decree would be voided.

8. Through law or ordinance?

Most measures suggested above will require legislative changes. Section 82-1, al. 5, as well as Title VI, of the Constitution wisely provide that measures dealing with the organization of the judiciary or the status of magistrates should be done by way of laws rather than decrees. However, Parliament is empowered by section 96 to delegate to the Executive the power to legislate by way of "ordinances", even on such matters. Indeed, the *Statut de la Magistrature* of 1979 was adopted by way of an ordinance, Such ordinances need not be ratified thereafter by Parliament, as s. 96 simply requires the introduction (but not the adoption) of a ratification bill in the National Assembly.

Though parliamentary timetables are clogged in many countries, it is advisable that measures dealing with the judiciary, in view of their symbolic and practical importance, not be passed by way of ordinances, but be fully discussed by Malagasy legislators.

E. OTHER ISSUES

As noted in the introduction, the basic perspective of the IRIS project in Madagascar was the creation of a legal and regulatory environment more conducive to foreign investment and economic transactions. While fostering the independence of the judiciary would bring Madagascar closer to that goal, it was suggested that measures to that effect should be supplemented by a better

training of Malagasy lawyers and magistrates in commercial law, and that arbitration clauses could be a valuable complement to, and even a substitute for, wholesale judicial reform. Those two issues will be dealt with below.

1. Training of judges in commercial law

Interviews with Malagasy magistrates amply confirmed that there was a strong need for better training in the area of commercial law. Magistrates were the first to acknowledge that 15 years of socialism had brought a marked decline in their own knowledge of this branch of the law. It was suggested that corruption was fostered in many instances not only by the importance of the bribe that might be offered to a magistrate, but also by the very ignorance by the magistrate of the right decision to be made.

The services offered by the International Development Law Institute in Rome appear to be well-tailored to the needs of Malagasy lawyers. The courses offered are focused on economic law. They are given in French as well as in English. They were favourably rated by the school's former students who I met in Madagascar.

The IDLI offers two training options. Participants may be brought from developing countries to Rome, where they will attend courses or seminars taught by professors attached to the Institute. The disadvantage of that option is that participants then normally come from sharply different countries, thus making it more difficult for instructors to adjust the contents of their lectures to the needs of each participant. The second option is for the Institute to organize on-the-spot two-week training workshops, with instructors being sent from Rome to a particular country with the necessary material. The contents of the workshops may then be more easily adjusted to the needs of

the participants. Indeed, one such workshop, funded by the United States Agency For International Development was taking place during my stay in Madagascar. Workshops of that nature should be organized for the benefit not simply of magistrates, but of lawyers from private practice as well.

The substance of the training should focus both on the public law issues affecting the new status of judiciary and the substantive commercial law issues which a newly empowered judiciary must adjudicate. In terms of the public law issues, IDLI should focus on the reform of the Statues des Magistrats and other related documents designed to increase judicial independence. This part of the workshop will focus on issues such as the authority of the judiciary versus the executive and legislative branch of government, access to the institutions of justice, judicial and civil procedure and other questions regulating the operation of the judicial branch independently of other government bodies. The rest of the focus should be on substantive commercial legal issues such as the law of contracts, property law including land use, company law, bankruptcy, torts and taxation. This segment should also focus on domestic and international methods of alternative dispute resolution.

2. Cost of Implementing Proposed Changes

The cost of implementing this program is insubstantial because most of the recommendations are designed to change the legal status of members of the judiciary rather than create new institutions. As this report details the crux of an independent judiciary depends on its power and privileges, and these changes do not cost money. For example, the recommendation to deprive the Minister of Justice of any formal role with the rating of magistrates would have a large impact on the judiciary's independence but impose no costs on the Government to implement. The overwhelming number of recommendations in this report are of this nature. One recommendation

which would impose some cost to implement would be to raise rhe pay of magistrates of the first grade to the equivalent of a prime minister while raising lower grades proportionately in order to reduce corruption.[60] Due to the lack of precise figures within the Ministry of Justice it is impossible to provide precise figures. But if the pay of all magistrates was increased to the recommended levels it would represent about a 50% increase in personnel costs for this one group of government officials. However, this increase would be offset with the implementation of the recommendation to eliminate the perk of free residences and cars. Because this perk is so expensive it is not provided to every magistrate. Hence there is the danger that this perk can be abused. There were no figures available detailing the exact number and cost of cars and homes, but approximately 60% of the magistrates not on probation receive a free house. If we assume that the cost of providing these perks to magistrates is the same as the cost of the perks to similarly paid civil servants in the executive branch then eliminating this perk along with the cars would reduce the cost to the budget by between 5- 10% Hence, the total impact on the government budget would be between a 40% and 45% increase in personnel costs for magistrates. These costs would reduce the opportunities and incentive for corruption, however.

While reducing the incentives for corruption are important, it is also important to raise the capacity of the judicial branch through the training program outlined above. The training program outlined above will equip members of the judiciary with substantive capacity in relevant areas of commercial and public law. The International Development Law Institute estimates that it can supply the training program suggested above for approximately USD $7 1 .OOO.

[60] The suggested salary level may look high but it takes into account the fact that magistrates unlike the Prime Ministers and his Cabinet would be deprived of most of the perks that are allotted to people fulfilling high executive duties.

3. Arbitration clauses

It is hoped that the reforms advocated above will increase the independence of the judiciary while keeping judges accountable to others than themselves. While those reforms are expected to increase the credibility of the judiciary, they will not solve the problems that economic operators are facing right now, especially the absence of clear rules regulating economic transactions.

Arbitration procedures have been advocated as a remedy to the poor present state of both the law and the judiciary in Madagascar. The Civil Code would be amended so as to empower parties to a contract to agree that disputes over the meaning of contracts will be solved by referees selected by the parties, and that they will abide by the referee's decisions. In doing so, the parties would follow the law that they established themselves through contract, and would avoid litigation in courts.

The idea is attractive, though Malagasy magistrates are understandably unattracted by it. However, it should be realized that arbitration is not a panacea to all problems affecting the legal and regulatory environment in Madagascar. For example, banks will not recover money from defaulters through arbitration[61]. There is no absolute certainty that referees will be less vulnerable to corruption than judges are sometimes claimed to be. Further, decisions by referees, once made, need judicial enforcement, which brings us back to the initial problem. It is not a sufficient deterrent for parties who refuse to abide by the decision of referees to acquire a bad reputation.

While arbitration procedures might improve business transactions, they do not stand as an alternative to a reform of the judiciary along the lines suggested in this report. Economic

[61] I am indebted to Alexandre Cordahi for that point, as well as on arbitration in general.

operators do suffer from the deficiencies of the judiciary as it now stands. The needs of all Malagasy for better justice, in all fields of the law, must also be taken into account.